

Attorneys for Creditor salesforce.com, inc.

In re:

Chapter 11

LIMITED OBJECTION AND RESERVATION OF RIGHTS OF SALESFORCE.COM, INC. TO PROPOSED ASSUMPTION OF CERTAIN EXECUTORY CONTRACTS AND CURE AMOUNTS

Related Docket Nos. 6320, 7037

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1 Subject entry of an order granting relief requested in this Assumption Objection,
2 Salesforce does not object to assumption of the Salesforce Contract to the Debtor.
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4 **RELIEF REQUESTED**

5 Salesforce seeks entry of an order (the “**Assumption Order**”) protecting its rights and
6 interests by including the following:

7 A. Findings of fact stating that: (1) the Salesforce Contract constitutes a
8 single integrated executory contract for purposes of assumption and assignment pursuant to 11
9 U.S.C. §365; and (2) pursuant to the Salesforce Contract, the aggregate amount of
10 **US\$ 1,562,705.42** (collectively, the “**Salesforce Cure Amount**”) is due and owing, but unpaid
11 as of May 15, 2020.²

12 B. The requirement that, as a condition of approving the assumption of the
13 Salesforce Contract, the Debtors shall pay not less than **US\$ 1,562,705.42** to cure the monetary
14 defaults of the Salesforce Contract, plus any additional amounts as may accrue prior to the
15 effective date of the assumption of the Salesforce Contract;

16 C. Approval of the Reservation of Rights (as set forth hereinafter); and

17 D. Grants such other relief as may be just and proper.

18 The Assumption Objection is based on the matters set forth herein, the *Declaration of*
19 *Kevin Ramirez in Support of Limited Objection and Reservation Of Rights of Salesforce.com, Inc.*
20 *to the Proposed Assumption Of Certain Executory Contracts And Cure Costs* (the “Ramirez
21 Declaration”) filed in support hereof, the files and the records in this case, and such other and
22 further evidence as may be submitted at or before the trial on this matter.

23 Salesforce requests that the Court take judicial notice of the pleadings filed in this case and
24 the facts set forth in the Court’s orders, findings of fact and conclusions of law pursuant to Rule
25 201 of the Federal Rules of Evidence (as incorporated by Rule 9017 of the Federal Rules of
26 Bankruptcy Procedure).

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28 ² See SFDC Cure Amount Summary attached as Exhibit A to the Ramirez Declaration at ¶13.

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BACKGROUND

1. Salesforce is a Delaware corporation and, among other activities, it provides on-demand customer relationship management and software application services (collectively, the “**Salesforce Services**”) to Salesforce’s business customers. (individually, a “**Salesforce Customer**” and, collectively, “**Salesforce Customers**”). See Ramirez Declaration at ¶2.

2. Pacific Gas and Electric Company (one of the above-identified Debtors) entered into certain Order Forms (the “**SFDC Orders**”) with Salesforce whereby Pacific Gas and Electric Company ordered Services from Salesforce and became obligated to pay the aggregate full contract amount for the Services, and Salesforce became obligated to provide the Services to the Debtors. See Ramirez Declaration at ¶6.³

3. The terms and conditions applicable to the Services that are subject to the Salesforce Orders are set forth in the *Master Subscription Agreements* by and between the Debtors and Salesforce, (the “**MSA**”, the MSA together with the SFDC Orders constitute the “**Salesforce Contract**”). See Ramirez Declaration at ¶7.

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BANKRUPTCY CASE

4. On January 29, 2019 (the “**Petition Date**”), each of the above-captioned Debtors (collectively, the “**Debtors**”) filed their individual, voluntary petitions in the above-captioned Court (the “**Court**”) seeking relief under Chapter 11 of title 11 of the United States Code (the “**Bankruptcy Code**”).

5. On February 7, 2020, the Debtors filed their Disclosure Statement⁴ (the “**Disclosure Statement**”) to their Proposed Plan⁵ (the “**Proposed Plan**”).

6. On February 19, 2020, the Debtors filed their motion seeking, among other things, approval of the Disclosure Statement and procedures for the solicitation and voting of the

³ The SFDC Orders are listed on the “SFDC Cure Amount Summary” which is attached hereto as Exhibit A, and incorporated by reference herein as if fully set forth.

⁴ See [Proposed] Disclosure Statement for Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization [ECF5700] (the “**Disclosure Statement**”)

⁵ See Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization Dated January 31, 2020 [ECF 5590] as revised on March 16, 2020 [ECF 6320] (the “**Proposed Plan**”)

Proposed Plan and the assumption of certain executory contracts and unexpired leases (the “**Disclosure Statement Motion**”).⁶

7. On March 17, 2020, the Court entered the Disclosure Statement Order⁷ approving the Disclosure Statement and the solicitation and voting procedures (the “**Plan Procedures**”) related to the Proposed Plan.

8. On May 1, 2020, pursuant to the Plan Procedures, the Debtors filed their Plan Supplement including, without limitation, *Exhibit B—Schedule of Executory Contracts and Unexpired Leases to be Assumed pursuant to the Plan and Proposed Cure Amount* (the “**Cure Notice**”)⁸ that identifies the executory contracts and unexpired leases that it may assume pursuant to the Proposed Plan, and the monetary defaults (the “**Cure Amounts**”) with respect to such contracts and leases that it contends must be cured as a condition of assuming a specific contract or lease. Among other executory contracts and unexpired leases, the Cure Notice identifies the following executory contract and related Cure Amount:

Non-debtor counterparty	Match ID	Contract ID	Debtor Name	Address	City	Stat e	Cou ntry	Zip	Title of Agreement	Effective Date of Agreement	Cure Amount
SALESFORCE.COM	1012706	SRCAST_C91_00869	PACIFIC GAS AND ELECTRIC COMPANY	1 MARKET ST, STE 300	SAN FRANCISCO	CA	US	94105	SALESFORCE.COM	9/27/2012	0
SALESFORCE.COM	1012706	SRCPOS_2700070676	PACIFIC GAS AND ELECTRIC COMPANY	1 MARKET ST, STE 300	SAN FRANCISCO	CA	US	94105	PURCHASE ORDER #2700070676 DATED 2/22/18	3/22/2018	\$4,585.75
SALESFORCE.COM, INC.	1012706	SRCDAL_02690	PACIFIC GAS AND ELECTRIC COMPANY	1 MARKET ST, STE 300	SAN FRANCISCO	CA	US	94105	PROFESSIONAL SERVICES AGREEMENT-SERVICE AGREEMENT	2/14/2018	\$0.00

⁶ See Debtors’ Motion for Entry of an Order (I) Approving Form and Manner of Disclosure Statement; (II) Establishing and Approving Plan Solicitation and Voting Procedures; (III) Approving Form of Ballots, Solicitation Packages, and Related Notices; and (IV) Granting Related Relief (the “**Disclosure Statement Motion**”) [ECF 5835].

⁷ See Order (I) Approving Form and Manner of Disclosure Statement; (II) Establishing and Approving Plan Solicitation and Voting Procedures; (III) Approving Form of Ballots, Solicitation Packages, and Related Notices; and (IV) Granting Related Relief (the “**Disclosure Statement Order**”) [ECF 6340].

⁸ See Notice of Filing of Plan Supplement in Connection with Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of reorganization Dated March 16, 2020 at Exhibit B—Schedule of Executory Contracts and Unexpired Leases to be Assumed pursuant to the Plan and Proposed Cure Amount at Page 1341-1342 (the “**Cure Notice**”) [ECF 7037].

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CURE AMOUNT

9. Based on its books and records pertinent to the Debtors' account, Salesforce submits that the Debtors have failed to pay all Fees due and owing pursuant to the Salesforce Contract, and more specifically, as of this date, not less than **US\$ 1,562,705.42** (the "**Salesforce Cure Amount**") is due and owing to Salesforce pursuant to the Salesforce Contract. *See* Ramirez Declaration at ¶13.⁹

GROUND FOR THE RELIEF REQUESTED

**The Salesforce Contract Constitutes an Integrated Contract
That Must Be Assumed in Its Entirety**

10. Pursuant to the United States Bankruptcy Code, a debtor-in-possession has the power, with court approval, to assume or reject any executory contract or unexpired lease. 11 U.S.C. §365(b)(1)(A).

11. The threshold issue for the Court in determining whether to approve the assumption of an executory contract is simply to identify what constitutes the executory contract at issue. As a practical matter, a commercial relationship often includes several agreements that, taken together, constitute an integrated relationship. The question, then, for purposes of contract assumption pursuant to 11 USC §365, is what constitutes the "executory contract" to be assumed. Where, as is the situation in the case before this Court, several agreements between the parties exist "it is well-settled that state law governs whether the agreements are separate or indivisible for purposes of §365." *In re New York Skyline, Inc.*, 432 B.R. 66, 77 (Bankr. S.D.N.Y. 2010) (applying New York state law); *In re Adelphia Bus. Solutions, Inc.*, 322 B.R. 51, 55 (Bankr. S.D.N.Y. 2005) (applying Missouri state law); *accord, Carlisle Corp. v. Uresco Const. Materials, Inc.*, 823 F. Supp. 271, 274 (M.D. Pa. 1993); *Pirinate Consulting Corp, LLC v. C.R. Meyer & Sons, Co. (In re Newpage Corporation)*, 2017 WL 571478 (Bankr. Del., Feb.

⁹ *See* SFDC Cure Amount Summary attached as Exhibit A to the Ramirez Declaration at ¶13. SFDC is continuing its reconciliation of the SFDC Cure Amount and, accordingly, reserves its right to revise the SFDC Cure Amount as necessary. *Id.*

13, 2017); *In re Buffets Holdings, Inc.*, 387 B.R. 115, 120 (Bankr. D. Del. 2008).

12. Here, SFDC Contract (by the terms of the MSA) provides that California law is the governing law of the SFDC Contract.¹⁰ “Under [California] Civil Code section 1642, “[s]everal contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.” *Fuentes v. TMCSF, Inc.*, 26 Cal. App. 5th 541, 548, 237 Cal. Rptr. 3d 256, 261 (Ct. App. 2018). In determining whether a series of agreements constitute an integrated contract or separate contracts, the intention of the parties is the first and foremost factor considered by a court. *Id. citing (Goodman v. Severin (1969) 274 Cal.App.2d 885, 895, 79 Cal.Rptr. 555.)*

13. Salesforce submits that the Parties’ commercial relationship between the Parties is embodied in one single, integrated contract – that is, the Salesforce Contract -- which includes the MSA and *all of the Orders identified on Exhibit “A”* filed with the Court (as attached to the Ramirez Declaration). The Debtors’ Cure Notice, in contrast, identifies only the following three executory contracts for assumption:¹¹

Non-debtor counterparty	Match ID	Contract ID	Debtor Name	Address	City	Stat e	Cou ntry	Zip	Title of Agreement	Effective Date of Agreement	Cure Amount
SALESFORCE.COM	1012706	SRCAST_C91_00869	PACIFIC GAS AND ELECTRIC COMPANY	1 MARKET ST, STE 300	SAN FRANCISCO	CA	US	94105	SALESFORCE.COM	9/27/2012	0
SALESFORCE.COM	1012706	SRCPOS_2700070676	PACIFIC GAS AND ELECTRIC COMPANY	1 MARKET ST, STE 300	SAN FRANCISCO	CA	US	94105	PURCHASE ORDER #2700070676 DATED 2/22/18	3/22/2018	\$4,585.75
SALESFORCE.COM, INC.	1012706	SRCDAL_02690	PACIFIC GAS AND ELECTRIC COMPANY	1 MARKET ST, STE 300	SAN FRANCISCO	CA	US	94105	PROFESSIONAL SERVICES AGREEMENT-T-SERVICE AGREEMENT	2/14/2018	\$0.00

¹⁰ Each of the Orders constituting the Salesforce Contract expressly states that: “This Order Form shall be governed by the Master Subscription Agreement between salesforce.com and Pacific Gas & Electric Company (the “MSA”) and any applicable addenda thereto, provided that the entity signing this Order Form is either the same entity that executed the MSA or an Affiliate thereof. If the entity signing this Order Form is an Affiliate thereof, such Affiliate agrees to be bound by the terms of the MSA as if it were an original party thereto.” (See Quote Special Terms at pg. 2.) Due to confidentiality constraints imposed by the MSA, none of the Agreements constituting the SFDC Contract have been filed at this time. However, copies of the agreements will be made available to the Debtor if requested. See Ramirez Declaration at ¶7.

¹¹ See Notice of Filing of Plan Supplement in Connection with Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of reorganization Dated March 16, 2020 at Exhibit B—Schedule of Executory Contracts and Unexpired Leases to be Assumed pursuant to the Plan and Proposed Cure Amount at Page 1341-1342 (the “Cure Notice”) [ECF 7037].

1 14. Salesforce contends that if, after confirmation of their Proposed Plan, the Debtors
2 intend to continue their current commercial activities (which utilize the Services provided by
3 Salesforce), it is necessary for the Debtors to assume all of the various orders and agreements
4 that constitute the integrated Salesforce Contract. Accordingly, Salesforce has requested that
5 the Court enter an Assumption Order that includes findings of fact that (A) the Salesforce
6 Contract is an integrated contract for purposes of assumption pursuant to 11 U.S.C. §365 and
7 (B) the Salesforce Contract (*i.e.*, as identified on Exhibit “A” attached to the Ramirez
8 Declaration) is assumed rather than simply the executory contracts described on the Debtors’
9 Cure Notice.

10 **All Defaults Under an Assumed Contract Must Be Cured**

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12 15. Where (as in the case before the Court) the debtor has defaulted on an executory
13 contract, the Bankruptcy Code prohibits the debtor from assuming the contract unless the
14 debtor:

- 15 (A) cures, or provides adequate assurance that the [debtor] will
16 promptly cure, such default
17 (B) compensates, or provides adequate assurance that the [debtor] will
18 promptly compensate, a party other than the debtor to such contract
19 or lease, for any actual pecuniary loss to such party resulting
20 from such default; and
21 (C) provides adequate assurance of future performance under such
22 contract or lease.

23 *See* 11 U.S.C. §365(b)(1)(A).

24 16. A debtor in possession is prohibited from assuming an executory contract or
25 unexpired leases unless it cures all monetary defaults in full – including all monetary defaults
26 that arise both pre-petition and post-petition. *See* 11 U.S.C. §365(b)(1)(A). “The other party to
27 the contract or lease that the [debtor in possession or] trustee proposes to assume is entitled to
28 insist that any defaults, whenever they may have occurred, be cured, that appropriate
compensation be provided, and that, a past default having occurred, adequate assurance of future
performance is available.” 3 COLLIERS ON BANKRUPTCY § 365.05[2] (Alan N. Resnick &

Henry J. Sommer eds., 15th ed. rev. 2008).

17. Here, the evidence submitted by Salesforce establishes that, as of this date, not less than US\$ 1,562,705.42 (*i.e.*, the Salesforce Cure Amount) is due, but unpaid, for the Salesforce Services provided pursuant to the Salesforce Contract. *See* Ramirez Declaration at ¶13. Accordingly, based on the evidence before the Court, the Debtors are obligated to cure this monetary default in full as a condition of assumption of the Salesforce Contract pursuant to 11 U.S.C. §365(b)(1)(A).

RESERVATION OF RIGHTS

18. Salesforce does not object to assumption of the Salesforce Contract provided the Assumption Order requires payment of the Salesforce Cure Amount (plus all amounts that accrue from this date through the effective date of the Assumption Order) in full and includes the other relief requested by this Limited Objection.

19. However, with respect to any and all other executory contracts and/or unexpired leases to which it is a counterparty (individually, an “Excluded Contract”) and, collectively, the “Excluded Contracts”) other than the Salesforce Contract, Salesforce hereby expressly reserves (the “Reservation of Rights”) all rights, interests, claims, counterclaims, rights of setoff and recoupment and/or defenses pertaining to any or all Excluded Contracts including, without limitation, (a) the right to object to the assumption and/or assignment by the Debtors of any such Excluded Contract, (b) the right to payment of all monetary defaults that exist with respect to each such Excluded Contract, and/or (c) the right to have the assignment of any such Excluded Contract specifically conditioned on the Court finding, based on competent evidence, that the actual, proposed assignee of such contract is capable of performing all terms and conditions of such Excluded Contract including, without limitation, payment of all amounts that will come due and owing subsequent to any such assignment.

WHEREFORE, if the Court determines to approve assumption of the Salesforce Contract, Salesforce requests that the Assumption Order include the following:

A. Findings of fact stating that: (1) the Salesforce Contract constitutes a single

1 integrated executory contract for purposes of assumption pursuant to 11 U.S.C. §365; and (2)
2 pursuant to the Salesforce Contract, the aggregate amount of **US\$ 1,562,705.42** (the Salesforce
3 Cure Amount) is due and owing, but unpaid as of May 15, 2020;

4
5 B. As a condition of approving the assumption of the Salesforce Contract, the
6 Debtors shall pay not less than **US\$ 1,562,705.42** to cure the monetary defaults under such
7 contract, plus any additional amounts as may accrue prior to the effective date of the assumption
8 of the Salesforce Contract;

9 C. Approval of the Reservation of Rights as herein; and

10 D. Grants such other relief as may be just and proper.

11 Dated: May 15, 2020

Respectfully submitted,

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13 /s/ Thomas M. Gaa

14 BIALSON, BERGEN & SCHWAB,

A Professional Corporation

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